FILED
JAN 8 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 484

VRILIUM PRODUCTS CO., a corporation, ROBERT T. NELSON, JR., and GEORGE C. ERICKSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

LESLIE E. SALTER,
SAMUEL MORGAN,
and RICHARD B. AUSTIN,
Attorneys for Petitioners.
105 West Adams Street,
Chicago, Illinois.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
The Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement of the Matter Involved	2
Specification of Errors	5
Reasons for Granting the Writ	6
Conclusion	10

CITATIONS.

Cases:

Glasser v. United States, 315 U. S. 60	6, 7, 8, 9, 10
Hardy v. United States, 186 U. S. 224	6
Isaacs v. United States, 159 U. S. 487	6
Jones v. Commonwealth, 97 F (2d) 335 (C.C.A. 6th 1938)	9
Powell v. Alabama, 287 U. S. 45	8
United States v. Bergamo et al, 154 F. (2d) 31 (C.C.A. 3rd, 1946)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

VRILIUM PRODUCTS CO., a corporation, ROBERT T. NELSON, JR., and GEORGE C. ERICKSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Vrilium Products Co., a corporation, Robert T. Nelson, Jr., and George C. Erickson, petitioners herein, respectfully pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on November 13, 1950.

The Opinion Below.

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in full in the record (R. 1442-1446).

Jurisdiction.

The judgment of the Court of Appeals was entered on November 13, 1950 (R. 1448). A petition for rehearing filed

on November 27, 1950, was denied on December 15, 1950 (R. 1450-1460, 1469). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented.

Whether the petitioners were denied the right to effective counsel and counsel of their own choice granted to all accused in criminal prosecutions by the Sixth Amendment to the Constitution of the United States.

Statement of the Matter Involved.

The pertinent facts are not seriously controverted. In an information containing one count the petitioners were charged with unlawfully causing to be introduced, and with delivering for introduction, into interstate commerce an allegedly misbranded device in violation of the Federal Food, Drug, and Cosmetic Act (R. A3a-A4a). Until March 25, 1949, their attorney of record was one Victor E. LaRue. On that date Mr. LaRue withdrew as their counsel. On April 1, 1949, he was replaced by the law firm of Chancellor & Chancellor, consisting of Mr. Justus Chancellor, Sr., and his son, Mr. Justus Chancellor, Jr. (A. A6-A16). Mr. Justus Chancellor, Sr., was then eighty-five years of age, ill, infirm, and hard of hearing. At his request the cause was continued to April 11, 1949, and again on April 8, 1949, for ten more days (R. A14, A24-A25, A28). Thereafter the cause was continued from time to time upon motion of the prosecution or for the convenience of the trial court until almost a year later on March 20, 1950 (R. A30-A36, A40-A41, A45-A47).

When the case was called on this last date, the following colloquy ensued (R. 1A-1C):

"Mr. Tobin: The Government is ready, your Honor.

"The Court: Both sides ready to proceed?

"Mr. Chancellor: No, your Honor. My son, who was to try this case had a heart attack yesterday and he cannot be here this morning. The doctor thinks it will take about two weeks for him to be in shape. I would like to ask your Honor to let it go for two weeks.

"The Court: I understood you were going to try the case.

"Mr. Chancellor: No, your Honor. No, I haven't assumed that.

"The Court: Has your son entered his appearance in this case?

"Mr. Chancellor: How?

"The Court: Has your son's appearance been entered in this case as counsel, as attorney for the defendants?

"Mr. Chancellor: Oh, yes.

"The Court: Jointly with you?

"Mr. Chancellor: Yes.

"The Court: Has the Government subpoenaed their witnesses for today?

"Mr. Tobin: Yes, we have brought witnesses, all the way from Japan, your Honor.

"The Court: Why can't you proceed with the case?

"Mr. Chancellor: Well, your Honor, I haven't assumed the burden of a jury trial for some years.

"The Court: Well, you happen to be personally known to this court. I am sure that you are competent to try a jury case, no question of that.

"Mr. Chancellor: I would say at one time, but I am not as competent now as I have been. I can do work but I would not want to assume the burden.

"The Court: There isn't any doubt in the Court's mind of your competency to try this case and represent these defendants properly. I think you should proceed, and the motion to continue is overruled.

"Send for a jury.

"Inasmuch as there are a number of defendants I think it is advisable that respective counsel occupy

separate tables. I suggest you take the table to the west, counsel, for the defendants.

"Mr. Chancellor: My hearing is not extra good, your Honor.

"The Court: Well, we have amplifiers, counsel. I don't hear so well, myself.

"Mr. Chancellor: I say, I don't hear as well as I did at one time."

No attempt was made to ascertain from the petitioners themselves whether they desired to be represented at the trial by Mr. Justus Chancellor, Sr. The receipt attached as an exhibit to the Petition for Rehearing filed in the Court of Appeals, although not properly a part of the record before this Court, shows clearly that they had retained the son and not the father (R. 1459).

The trial covered a period of thirteen working days. From the beginning it was obvious that Mr. Justus Chancellor had not exaggerated his auditory deficiencies or his unpreparedness. At one point, after Mr. Chancellor had repeatedly misdescribed a certain individual, the court found it necessary to inform him that a witness was "testifying about a male patient. You are constantly referring to the patient as a woman." Mr. Chancellor continued to refer to the patient in the feminine gender (R. 426-432). At another stage of the proceeding the court inquired, "do you have any difficulty hearing from where you are sitting"? When Mr. Chancellor replied, "I get along very well," the court graciously suggested that, "You may move your chair up farther. We can arrange one of these small tables up closer" (R. 442).

Near the close of the case the court asked whether Mr. Chancellor had any suggested instructions to submit. Mr. Chancellor's reply was that all of his time had been devoted to the trial and that he had not had an opportunity "to do

any of that work." When asked whether he had an associate who might assist him, he said, "No, my son is the only one that could, and he has been sick all the time. All that I have is a stenographer" (R. 1321). Of the six instructions tendered by him two days later five were rejected by the court (R. 1366).

The prosecution requested and used approximately an hour for its argument to the jury (R. 1366-1402, 1411-1413). Although granted an equivalent amount of time, Mr. Justus Chancellor, Sr., spoke for not more than ten minutes (R. 1403-1411). During that period he failed to say one word about the obvious weakness and deficiency of the Government's evidence adduced for the purpose of proving shipment in interstate commerce as alleged in the information.

The jury having returned a verdict of guilty, the trial judge sentenced each of the defendants, George C. Erickson and Robert T. Nelson, Jr., to imprisonment for a year and to pay a fine of One Thousand Dollars ($1,000.00), together with costs and charges, and sentenced the defendant, Vrilium Products Co., a corporation, to pay a fine in the same amount, together with costs and charges (R. A53-A54). On appeal this judgment was affirmed by the Court of Appeals for the Seventh Circuit (R. 1448).

Specification of Errors.

The United States Court of Appeals for the Seventh Circuit erred:

1. In failing to hold that the action of the trial court in refusing to grant a continuance and in forcing the petitioners to trial with representation by an attorney who was eighty-six years of age, ill, infirm, and unprepared was, under the circumstances described in the Statement above, a denial of the petitioners' right to the assistance of counsel

guaranteed by the Sixth Amendment to the Constitution of the United States.

2. In holding that, under the circumstances described in the Statement above, the petitioners were represented by counsel of their own choice.

3. In holding that the granting or denial of a continuance, under the circumstances described in the Statement above, was purely and solely a matter within the discretion of the trial court.

4. In completely disregarding the decision in *Glasser* v. *United States,* 315 U.S. 60 (1941), and, in particular, in failing to hold that the trial court was under a duty to ascertain from the petitioners themselves whether the aged attorney who was forced to conduct their defense was in fact counsel of their own choice.

5. In affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

Reasons for Granting the Writ.

1. The decision of the United States Court of Appeals for the Seventh Circuit in the instant cause is directly in conflict with the holding of this Court in *Glasser* v. *United States,* 315 U.S. 60 (1941). Although this last case was cited and heavily relied on by the petitioners in their brief below, the Court of Appeals not only made no attempt to distinguish it but even omitted to mention it in the opinion rendered. Instead, the Court of Appeals chose to base its decision in large part upon the authority of *Isaacs* v. *United States,* 159 U. S. 487, and *Hardy* v. *United States,* 186 U. S. 224, neither of which involved a violation or even a consideration of the Sixth Amendment.

The proposition for which the *Glasser* decision stands four square, as applied to the facts in the instant cause, is

that the trial court was under a duty to ascertain from the petitioners themselves whether Mr. Justus Chancellor, Sr., was in fact counsel of their own choice. In the *Glasser* case one of the defendants, who was himself an attorney of substantial experience, had retained one William Scott Stewart to represent him. On the day of trial the court was informed that counsel for one Kretske, a co-defendant, was withdrawing. The district judge thereupon requested Stewart to act for Kretske as well as Glasser. The latter at first objected to the proposed arrangement, but later remained silent when Stewart expressed his willingness to act for both of the said defendants. In commenting on these facts, this Court said:

> "The court made no effort to re-ascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart, is to do violence to reality, and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

This Court added that, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the accused."

These words have a direct, specific, and unmistakable application to the instant cause. When informed by Mr. Justus Chancellor, Sr., that his son had been retained to try the case on behalf of the petitioners, the trial court was bound by the holding in the *Glasser* case to inquire of the petitioners whether Mr. Justus Chancellor, Sr., or Mr. Justus Chancellor, Jr., was the attorney of their choice. This duty the trial judge disregarded, and the Court of Appeals ignored.

If the petitioners had been interrogated by the trial judge, their answer and the evidence which they had avail-

able would have been to the effect that they had hired Mr. Justus Chancellor, Jr. The original retainer receipt attached to the petition for rehearing has already been referred to (R. 1459), but, even in the absence of any evidence, it is hardly conceivable that the petitioners, as reasonable men, would of their own free will have retained an ill, infirm, unprepared, and out-of-practice octogenarian to conduct a protracted jury trial which would have taxed the energies of a much younger man. While it is true that Mr. Justus Chancellor, Sr., did appear before the court on several occasions prior to March 20, 1950, his services were at all times of a nature colloquially described as "leg work." The task of conducting the defense at the trial had been placed not upon his aged back but upon the more youthful shoulders of his son. In holding that Mr. Justus Chancellor, Sr., was counsel of the petitioners' own choice the Court of Appeals has made a mockery of the guarantee to the assistance of counsel contained in the Sixth Amendment.

Under the holding in the *Glasser* case and in *Powell* v. *Alabama,* 287 U. S. 45, the petitioners were entitled not only to counsel of their own choice but to *effective* counsel. In the opinion below it is said that, "We have examined the record and can find no indication that their [the petitioners'] counsel was incompetent or negligent. The insinuations now made on behalf of the appellants that he was 'ineffective' because of the loss of his sense of hearing, finds no justification in this record" (R. 1445). In reply petitioners can only reiterate the following from their petition for a rehearing below:

> "Counsel for the appellants have made no 'insinuations'. They charge flatly and without reservation that Mr. Justus Chancellor, Sr., was absolutely incompetent in the trial of the appellants not only because of the loss of his hearing but because of his advanced age, his lack of experience of many years standing in the trial

of a jury case, his obvious physical infirmities, his failure even to mention the one weak point in the Government's case, and his omission to deliver anything remotely resembling a persuasive argument to the jury'' (R. 1456).

2. The decision of the Court of Appeals in the instant cause is in conflict with the decisions of other courts of appeals on the same matter. Unlike most other types of cases in which this Court has granted *certiorari,* cases involving violations of the Sixth Amendment turn primarily on questions of fact. It is consequently difficult to establish a conflict in the usual sense between courts of appeal, but a definite conflict nevertheless exists. It is revealed not by the enunciation of antagonistic principles but by a difference in attitude, approach, and interpretation.

The ruling in *Glasser* v. *United States,* 315 U. S. 60 (1941), which arose in the same Circuit as the instant cause, has not, in the opinion of counsel for the petitioners, been warmly received there. In support of this statement it is respectfully suggested that the opinion below be compared with those in *United States* v. *Bergamo, et al.,* 154 F. (2d) 31 (C.C.A. 3rd, 1946) and *Jones* v. *Commonwealth,* 97 F. (2d) 335 (C.C.A. 6th 1938), among others. The trial court below was apparently extremely concerned with the delay in the disposition of its docket and with the inconvenience to witnesses which might result from the granting of a continuance. On this score the following eloquent excerpt from the *Jones* case is illuminating:

> ''It is of course, perfectly true as noted in *Powell* v. *Alabama* [287 U.S. 45 (1932)] * * * that great and inexcusable delay in the enforcement of criminal law has been a serious evil of the times and has brought the administration of criminal laws into disrepute. But we progress little if freeing the administration of justice from one evil we permit it to become enmeshed in a

second, and in our effort to achieve promptness go forward with such haste as to close the door upon the 'calm spirit of regulated justice.' ''

3. The question presented is of paramount importance in the administration of criminal law. Even at this late date the full import of the Sixth Amendment is apparently not recognized by some of our courts. A few of them seem to regard *Glasser* v. *United States,* 315 U. S. 60(1941), as restricted in scope to the peculiar facts there reviewed and therefore unique. Counsel for the petitioners are of the opinion that the *Glasser* case held that the only sure way to determine whether a defendant is represented by counsel of his own choice is to ask the defendant whether he is so represented. The validity of this interpretation is a matter of concern to everyone engaged in the administration of criminal law.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

LESLIE E. SALTER,
SAMUEL MORGAN,
RICHARD B. AUSTIN,
Counsel for Petitioners.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	7
Conclusion	12

CITATIONS

Cases:

Avery v. *Alabama*, 308 U. S. 444	10
Couchois v. *United States*, 142 F. 2d 1, certiorari denied, 323 U. S. 754	10
Glasser v. *United States*, 315 U. S. 60	10
Hardy v. *United States*, 186 U. S. 224	10
Isaacs v. *United States*, 159 U. S. 487	10
Lias v. *United States*, 51 F. 2d 215, affirmed, 284 U. S. 584	10

Constitution and Statute:

Sixth Amendment	7
Federal Food, Drug, and Cosmetic Act (21 U. S. C. 331, 333, and 352); Secs. 301, 303, and 502	2

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 484

VRILIUM PRODUCTS CO., a corporation, ROBERT T. NELSON, JR., and GEORGE C. ERICKSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 1442a-1446) [1] is reported at 185 F. 2d 3.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1950 (R. 1448) and a petition for rehearing was denied on December 15,

[1] The designation "R." herein will be used to refer to the condensed record on appeal. "Tr." will be used to refer to the original transcript, in three volumes, of the trial proceedings.

1950 (R. 1469). The petition for a writ of certiorari was filed on January 8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether petitioners were deprived of their right under the Sixth Amendment to the assistance of counsel.

STATEMENT

An information in one count filed on January 20, 1947, in the United States District Court for the Northern District of Illinois (R. 2) charged the corporate petitioner, Vrilium Products Co., and the individual petitioners, George C. Erickson and Robert T. Nelson, Jr., the company's president and vice-president, respectively, with having violated Sections 301, 303, and 502 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331, 333, and 352) in that they caused to be introduced into interstate commerce a carton containing "Vrilium Catalytic Barium Chloride" tubes, together with accompanying instructions to the effect that the tubes gave forth emanations having physiological value and were effective in treating various specified ailments, whereas in truth the devices were ineffective for the treatment of such illnesses (R. 3a-4a). Petitioners pleaded not guilty and the trial was set for October 6, 1948 (R. 5). However, in consequence of numerous continu-

ances, many at petitioners' request,[2] the trial was postponed until April 4, 1949 (R. 7-8).

On April 1, 1949, Justus Chancellor, Sr., a member of the law firm of Chancellor & Chancellor, entered an appearance on petitioners' behalf and filed a motion to substitute himself and his partner-son, Justus Chancellor, Jr., for Victor La Rue, the attorney who had represented petitioners up to that time, La Rue having been discharged by petitioners a week earlier, on March 25. The motion being allowed, Chancellor, Sr. requested an additional 60-day continuance. The court, however, after informing the attorney that the trial had already been postponed several times and that the Government had been ready at all times, set the trial for April 11, 1949. (R. 6-17.) On April 8, Chancellor, Sr. again appeared before the court and stated that "if your Honor can grant *me* 50 days' time, *I* would be ready for trial in this case." (Italics supplied.) The court refused to grant as long a continuance as had been requested, but did grant an additional continuance of one week, setting the trial for April 18. (R. 18-28.)

Thereafter the trial was again postponed, this time until November 14, 1949. This latest continuance was at the request of the Government, the reason being that the attorney who had been han-

[2] The Government and its numerous witnesses from all sections of the country were ready at all times. Two or three of the continuances were for the court's convenience (R. 7-8).

dling the case had resigned to take another position. (R. 30-32.) The record indicates that this attorney, who had held himself and forty witnesses from various parts of the country in readiness for trial for over a year, found it impossible to continue to postpone his prospective resignation any longer (R. 26-27, 31, 32). On November 8, a week before the trial date, Mr. Chancellor, Sr. sought and obtained leave from the court, who remarked that it was rather late in the proceedings for that type of action, to file a motion to quash the complaint and dismiss the information (R. 34-36). Because of this motion, the case was once again continued (R. 40-41). On March 6, 1950, the motion was overruled and the case reset for trial beginning March 20 (R. 45-47). In all the court appearances thus far mentioned, Chancellor, Sr. was the only attorney who had appeared in person on petitioners' behalf. His son and partner, though also an attorney of record in the case (*supra,* p. 3), had at no time made a personal appearance. (R. 6-47.)

On March 20, 1950, the day set for trial under the court's last previous order, Chancellor, Sr. appeared on behalf of petitioners and, when asked if he was ready to proceed to trial, replied, "No, your Honor. My son, who was to try this case had a heart attack yesterday and he cannot be here this morning. The doctor thinks it will take about two weeks for him to be in shape. I would like to ask your Honor to let it go for two weeks" (Tr.

1A). This was the first time that there had been any indication that Chancellor, Jr. was to represent petitioners at the trial. The record discloses that the following colloquy then occurred (Tr. 1A-1C):

> The Court: I understood you were going to try the case.
>
> Mr. Chancellor: No, your Honor. No, I haven't assumed that.
>
> The Court: Has the Government subpoenaed their witnesses for today?
>
> Mr. Tobin: Yes, we have brought witnesses, all the way from Japan, your Honor.
>
> The Court: Why can't you proceed with the case?
>
> Mr. Chancellor: Well, your Honor, I haven't assumed the burden of a jury trial for some years.
>
> The Court: Well, you happen to be personally known to this court. I am sure that you are competent to try a jury case, no question of that.
>
> Mr. Chancellor: I would say at one time, but I am not as competent now as I have been. I can do work but I would not want to assume the burden.
>
> The Court: There isn't any doubt in the Court's mind of your competency to try this case and represent these defendants properly. I think you should proceed, and the motion to continue is overruled.
>
> * * *

> Mr. Chancellor: My hearing is not extra good, your Honor.
>
> The Court: Well, we have amplifiers, counsel. I don't hear so well myself.
>
> Mr. Chancellor: I say, I don't hear as well as I did at one time.

The case thereupon proceeded to trial, petitioners themselves registering no protest.

The trial lasted thirteen days—the prosecution's case consuming five days and the defense's, seven. It involved technical, scientific, and medical issues relating to the treatment of such illnesses as thyroiditis, arthritis, leukemia, and sinusitis, and the effect of the "Vrilium" tubes thereon. It required a degree of familiarity with such technical matters as nuclear physics, the use of a geiger counter commonly employed in the detection of the presence of radioactive materials, X-ray diffraction patterns, and spectrographic analyses, in addition to many types of diseases, their symptoms, and proper treatment.

Petitioners were found guilty (R. 53) and fined $1,000 each. In addition, each of the individual petitioners was sentenced to one year's imprisonment. (R. 54.) On May 5, 1950, petitioners discharged Chancellor, Sr. and retained other counsel for appeal purposes. They paid the firm of Chancellor & Chancellor $8,800 for its services. (R. 62-68). On appeal to the Court of Appeals for the Seventh Circuit, that court affirmed the convictions (R. 1442-1446).

ARGUMENT

Petitioners' single contention is that they were denied their right under the Sixth Amendment to the assistance of counsel of their own choice at the trial (Pet. 6-10). Despite the fact that Chancellor, Sr. had been retained as their counsel with their consent (R. 1443), they assert that it was Chancellor, Jr., not his father, whom they desired to conduct their defense. They argue that because Chancellor, Sr. was advanced in age and unable to hear well he was wholly incompetent to conduct their defense efficiently, and that in the circumstances, the failure of the trial judge to grant a continuance that would enable Chancellor, Jr. (who was reported as being ill) to represent them at their trial, was tantamount to depriving them of their right to be represented by efficient counsel of their own choosing.

Petitioners' contention is without substance. Their argument ignores the plain fact that Chancellor, Sr., as well as Chancellor, Jr. was counsel of petitioners' choice, both of the Chancellors having been retained by them (R. 1443). In fact, from April 1, 1949, when the firm of Chancellor & Chancellor had become associated with the case, to the day of the trial, Chancellor, Sr. had carried the entire burden of appearing in court on behalf of petitioners (R. 1444). Chancellor, Jr., although he had been counsel of record for more than eleven

months, had never personally appeared in behalf of petitioners, nor had his name been previously mentioned in the preliminary proceedings involving the motion to dismiss the information and the numerous continuances sought and obtained by Chancellor, Sr. on behalf of petitioners (R. 1444). Furthermore, Chancellor, Sr.'s statement to the trial court on April 8, 1949, (*supra,* p. 3) plainly indicated that it was he who would try the case, and the trial judge so understood (*supra,* p. 5). Thus, it is beyond controversy that Chancellor, Sr. was not only counsel of petitioners' choice at the outset of the firm's participation in their defense, but he continued to be their choice because he was the only attorney of the firm who had ever actively appeared in petitioners' behalf for the period of more than eleven months prior to the trial during which Chancellor & Chancellor had been attorneys of record.

It is likewise beyond controversy that Chancellor, Sr. was an experienced and competent advocate. Although an elderly gentleman, he was personally known to the district judge to be not only a competent trial lawyer generally but also competent "to try this case and represent these defendants" (*supra,* p. 5). And nowhere did Chancellor, Sr. deny being sufficiently acquainted with the facts and issues that would be involved in the trial to be able to conduct the defense. His only expressed reason for preferring his son to

conduct the defense was that he, Chancellor, Sr., was "not as competent now" as he had formerly been. The context plainly indicates that he was referring to his competence in general, which he claimed was somewhat impaired by his advanced age, and not to his ability to try the particular case at hand. The trial of this case involved technical scientific and medical issues of a highly specialized nature (*supra,* p. 6). If Chancellor, Sr. had felt the least bit unprepared to cope with such issues, he certainly would have so advised the judge. The only specific respect in which he impugned his own ability to try cases generally or this case in particular related to his capacity to hear. That, he said, was "not extra good"—by which he meant, as he explained, that it was not so good as it had been "at one time" (*supra,* p. 6). When the judge, in reply, reminded him that "we have amplifiers, counsel," he did not press the point. Petitioners themselves at no time registered any protest against going to trial represented by the elder Chancellor.

In the light of all the facts, it is clear that the trial judge was entirely justified in denying the request for a continuance on the day of the trial. A period of three years had elapsed since the filing of the information, the witnesses were ready, and petitioners' regular counsel, known personally to the judge to be competent, was present. In the circumstances, it was reasonable for the trial judge

to insist that the trial of the case be no longer delayed. This Court has long held that the granting or denial of a continuance is entirely discretionary with the trial judge and is not subject to review except upon a clear showing of abuse of discretion. *Avery* v. *Alabama,* 308 U.S. 444, 450; *Hardy* v. *United States,* 186 U. S. 224; *Isaacs* v. *United States,* 159 U.S. 487, 489; see also *Couchois* v. *United States,* 142 F.2d 1, 2 (C.A. 5), certiorari denied, 323 U.S. 754; *Lias* v. *United States,* 51 F.2d 215 (C.A. 4), affirmed, 284 U.S. 584. For the reasons stated, there has been no such showing in this case.

The case of *Glasser* v. *United States,* 315 U. S. 60, on which petitioners mainly rely, is plainly inapposite. Glasser was held to have been deprived of the undivided and effective assistance of his personally selected counsel because the same counsel had been appointed by the court to represent, in addition to Glasser, a codefendant with conflicting interests (315 U.S. at pp. 67-76). There is, of course, no suggestion here that Chancellor, Sr. simultaneously represented any one having interests which conflicted with those of petitioners, or that he was otherwise trammeled in devoting his undivided attention to their interests.

Petitioners' assertion that their attorney demonstrated incompetence and negligence at the trial (Pet. 8-9) is not borne out by the record. The Court below stated that it had "examined the

record and can find no indication that their counsel was incompetent or negligent" (R. 1445). This conclusion is in accord with the trial judge's estimate of Mr. Chancellor, Sr.'s abilities, expressed before the trial (*supra,* p. 5), and there is nothing to indicate that the judge's belief in that respect was changed by anything that occurred at the trial. Furthermore, the fact that petitioners paid the firm of Chancellor & Chancellor a very substantial fee for the service of Chancellor, Sr. (*supra,* p. 6), without protest, so far as appears, is some indication that they themselves were not dissatisfied with his services. Petitioners stress the elder Chancellor's inability to hear well (Pet. 4, 8). But, as the Court below pointed out, the contention that he was incompetent because of loss of hearing power "finds no justification in this record" (R. 1445). Petitioners are able to point to but one isolated instance, occurring in a trial which lasted thirteen days and the record of which covers some 1500 typewritten pages, in support of their claim that their counsel's impaired hearing interfered with his competence at the trial. They also complain that their attorney failed to discuss, in his summation to the jury, an "obvious weakness and deficiency" in the Government's proof (Pet. 5, 9). The "deficiency" to which they refer was a claimed insufficiency of evidence that the "Vrilium" tubes had been shipped in interstate commerce (Pet. 5). But the court below found this claim to be baseless, and petitioners,

significantly, do not press their contention in this Court.

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decision, and further review is not warranted. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

PHILIP R. MONAHAN,
FELICIA H. DUBROVSKY,
Attorneys.

FEBRUARY 1951.

☆ U. S. Government Printing Office: 1951 J931343/573